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Supreme Court, U.S.
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No. 94-2118

In the Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM T. CONKLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

JONATHAN S. COHEN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether an award of attorney's fees for prosecuting a frivolous appeal was properly entered against petitioner.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Baskin v. *United States*, 738 F.2d 975 (8th Cir. 1984)	5
Betz v. *United States*, 753 F.2d 834 (10th Cir. 1985)	5
Brooks v. *Allison Div. of General Motors Corp.*, 874 F.2d 489 (7th Cir. 1989)	3, 4
Chambers v. *NASCO, Inc.*, 501 U.S. 32 (1991)	5
Church of World Peace v. *Commissioner*, 52 F.3d 337 (10th Cir. 1995)	6
Church of World Peace, Inc. v. *United States*, 86-1 U.S.T.C. ¶ 9375 (D. Colo. 1986)	6
Conklin v. *Commissioner*:	
54 T.C.M. (CCH) 173 (1987)	6
897 F.2d 1027 (10th Cir. 1990)	6
Conklin v. *United States*:	
85-2 U.S.T.C. ¶ 9534 (D. Colo. 1985)	6
812 F.2d 1318 (10th Cir. 1987)	6
36 F.3d 1105 (10th Cir.), cert. denied, 115 S. Ct. 583 (1994)	6
No. 95-1013 (10th Cir. July 31, 1995)	6
Eicher v. *United States*, 774 F.2d 27 (1st Cir. 1985)	5
Haines v. *Kerner*, 404 U.S. 519 (1972)	6
McKnight v. *General Motors Corp.*, 114 S. Ct. 1826 (1994)	5
Pleasant v. *Lovell*, 974 F.2d 1222 (10th Cir. 1992)	6
Steinbrecher v. *Commissioner*, 712 F.2d 195 (5th Cir. 1983)	5

Cases—Continued: Page

United States v. *Church of World Peace*, 775 F.2d 265 (10th Cir. 1985), appeal after remand, 878 F.2d 1281 (10th Cir. 1989) 6

Constitution, statutes and rule:

U.S. Const. Amend. V 2, 4, 5
Internal Revenue Code (26 U.S.C.):
§ 6702 2
§ 6703(c) 2
10th Cir. R. 27.2.1 4

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15-18) is unpublished, but the decision is noted at 56 F.3d 77 (Table). The order of the district court was delivered orally from the bench at the conclusion of a hearing and is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1995 (Pet. App. 15). The petition for a writ of certiorari was filed on June 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Although petitioner filed an income tax return for 1987, he refused to sign it. He claimed that signing his return would waive his rights under the Fifth Amendment to the United States Constitution. The Internal Revenue Service assessed a $500 penalty against petitioner under Section 6702 of the Internal Revenue Code for filing a frivolous return. Petitioner paid $75 of the penalty and sued for a refund in district court. See 26 U.S.C. 6703(c) (1988 & Supp. V 1993).

The district court granted summary judgment to the United States. The court held that petitioner's blanket assertion of a Fifth Amendment privilege was a frivolous ground for not signing his return and justified imposition of a frivolous return penalty under Section 6702.

2. The court of appeals affirmed (Pet. App. 23-30) and also imposed attorney's fees and double costs as a sanction for petitioner's frivolous appeal (*id.* at 29). The court remanded the case to the district court "to make the appropriate determinations" as to the amount of counsel fees (*ibid.*). This Court denied the petition for a writ of certiorari that petitioner filed from the judgment of the court of appeals. 115 S. Ct. 583 (1994).

3. On remand, the district court awarded attorney's fees of $5,999.36 to the government. The court stated that "the rate claimed by government counsel was not challenged and the time spent in first determining the nature of [petitioner's] claims and then meeting them was reasonable" (Pet. App. 16-17).

4. The court of appeals affirmed (Pet. App. 15-22). The court noted that, under the order of remand from

the original appeal, the only issues properly before the district court were the reasonable time and reasonable charges for the work performed by government counsel. Since petitioner offered no evidence on either of those issues, the court of appeals upheld the district court's calculation of the proper award (*id.* at 16-18).

The court declined petitioner's invitation to reconsider the appropriateness of an award of fees for the prior frivolous appeal. The court noted that "[t]hese matters have already been decided, and we will not rehear them" (*id.* at 17).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. This Court denied the petition for a writ of certiorari from the order directing the award of attorney's fees for petitioner's frivolous appeal. 115 S. Ct. 583 (1994). On remand from that order, the district court properly determined that the reasonable attorney's fees for the frivolous appeal was $5,999.36. Petitioner offered no evidence to support any different award. The court of appeals therefore correctly affirmed the award.

2. Relying on *Brooks* v. *Allison Div. of General Motors Corp.*, 874 F.2d 489, 490 (7th Cir. 1989), petitioner contends (Pet. 11) that the award of attorney's fees was inappropriate in this case because the government failed to mitigate its damages. That contention is incorrect.

In *Brooks*, the district court awarded summary judgment to the defendant because the statute of

limitations barred the plaintiff's claim. The plaintiff appealed but failed to specify any particular error in the decision below. Instead of filing a motion to dismiss the appeal as frivolous, the appellee filed a brief on the merits. The Seventh Circuit stated that, by failing to file a motion to dismiss the appeal as frivolous, appellee had failed to mitigate the burdens that the frivolous pleading imposed upon it. 874 F.2d at 490.

In the present case, however, Rule 27.2.1 of the Rules of the Tenth Circuit provides that a motion to dismiss may be filed "only on the ground that the appeal is not within the jurisdiction of this court." The government was therefore required to file an answering brief in response to petitioner's appeal. The award of fees in this context was appropriate.

3. Petitioner seeks to renew his contention that it was error to award fees as a sanction for his original frivolous appeal. His arguments, although not entirely clear, appear to be that: (i) he was denied due process when, on remand to the district court, he was not allowed to challenge the order that sanctions be entered; (ii) an award of fees for a frivolous appeal is inappropriate in this case because his Fifth Amendment objection to signing his income tax return presented a question of first impression; and (iii) the award of fees was inappropriate because he is a *pro se* litigant and reasonably relied upon the law as he understood it. None of these claims has merit.

(i) Petitioner received due process in challenging the sanctions entered against him by participating in the appeal from which the order of sanctions was entered and by petitioning this Court for a writ of certiorari from that order. Petitioner received due process in challenging the calculation of the fee

award by appearing in the district court to contest the award, by appealing that award to the court of appeals and by petitioning from the affirmance of that order to this Court. No further or other process is due.

(ii) The Fifth Amendment claim that petitioner asserts does not present a question of first impression. As the court of appeals noted at the time that it entered the award of fees as a sanction for petitioner's frivolous appeal, "[i]t is well settled that the Fifth Amendment general objection (to filing a proper tax return) is not a valid claim of the constititutional privilege" (Pet. App. 27, quoting *Betz* v. *United States*, 753 F.2d 834, 835 (10th Cir. 1985)). See also *Eicher* v. *United States*, 774 F.2d 27 (1st Cir. 1985); *Baskin* v. *United States*, 738 F.2d 975 (8th Cir. 1984); *Steinbrecher* v. *Commissioner*, 712 F.2d 195 (5th Cir. 1983).

Aside from the fact that petitioner's case obviously does *not* present a question of first impression, petitioner errs in contending that attorney's fees may not be awarded in a case that presents a *frivolous* question of first impression. The cases on which petitioner relies (Pet. 11) do not support that proposition. In *McKnight* v. *General Motors Corp.*, 114 S. Ct. 1826 (1994), the Court vacated sanctions against petitioner when the appeal was filed to preserve an issue that the Supreme Court had not then decided where the answer "was not so clear as to make petitioner's position frivolous." *Ibid.* And, in *Chambers* v. *NASCO, Inc.*, 501 U.S. 32 (1991), which petitioner cites without explanation, the Court upheld an award of attorney's fees for bad faith in the conduct of litigation. *Id.* at 55. The decision of the court of

appeals in this case does not conflict with either of those decisions.

(iii) Petitioner appears to rely (Pet. 8-9) on *Haines* v. *Kerner*, 404 U.S. 519 (1972), for the proposition that it was error to award fees against him because he is a *pro se* litigant. In *Haines*, the Court found that certain "inartfully pleaded" allegations of a *pro se* litigant were sufficient to withstand a motion to dismiss. *Id.* at 520. In this case, by contrast, petitioner's allegations were clear; but they were also clearly frivolous. *

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* Petitioner has a lengthy history of litigation in the courts below. See, *e.g.*, *Conklin* v. *United States*, No. 95-1013 (10th Cir. July 31, 1995); *Church of World Peace* v. *Commissioner*, 52 F.3d 337 (10th Cir. 1995) (Table); *Conklin* v. *United States*, 36 F.3d 1105 (10th Cir.) (Table), cert. denied, 115 S. Ct. 583 (1994); *Pleasant* v. *Lovell*, 974 F.2d 1222 (10th Cir. 1992); *Conklin* v. *Commissioner*, 897 F.2d 1027 (10th Cir. 1990); *United States* v. *Church of World Peace*, 878 F.2d 1281 (10th Cir. 1989); *Conklin* v. *United States*, 812 F.2d 1318 (10th Cir. 1987); *United States* v. *Church of World Peace*, 775 F.2d 265 (10th Cir. 1985); *Conklin* v. *Commissioner*, 54 T.C.M. (CCH) 173 (1987); *Church of World Peace, Inc.* v. *United States*, 86-1 U.S.T.C. ¶ 9375 (D. Colo. 1986); *Conklin* v. United States, 85-2 U.S.T.C. ¶ 9534 (D. Colo. 1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

JONATHAN S. COHEN
Attorney

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